IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.215 OF 2005

Shri.Kalu Babu Tarne
and others ...Petitioners

Vs.

Bango Undru Tarne and
Ors. ...Respondents

....

Mr.K.S.Dewal for Petitioners.
Mr.A.R.Pitale for Respondent Nos.1b to 1f

....

CORAM : B.H.MARLAPALLE,J.

DATE : APRIL 6,2005

P.C.:

1. Heard Mr.Dewal, the learned counsel for the Petitioners and Mr.Pitale, the learned counsel for the Respondent No.1b to 1f. The respondent no.1a is no more and the remaining respondents are legal heirs.

2. Rule. Respondents waive service of notice of Rule.

3. As the petition involves very limited issue, rule is taken up for final hearing forthwith.

4. The Petitioners have filed R.C.S.No. 2 of 1989 and in the said suit they moved an application under

Order XXIII Rule 1(3) of C.P.C. seeking permission to withdraw the said suit with liberty to file a fresh one for the reasons stated therein. This application was presented on or about 27.11.2001 and was opposed by the defendants vide their say dated 13.12.2001. The learned Jt.C.J.J.D. Shahapur vide his order dated 3.5.2003 rejected the said application at Exh. 108.

5. Thereafter, the Plaintiffs filed an application for amendment of the plaint on or about 13.8.2003 and the same came to be marked at Exh.116. It was opposed and the say was filed at Exh.118 by the Defendants. The trial Court by its order dated 6.12.2004 rejected the application for amendment and hence, this petition.

6. The impugned order dated 6.12.2004 reads as under:

> . "Perused the application and say at Exh.118. It appears that the case is part-heard. At this stage, the application is not tenable and hence, rejected."

7. When the application at Exh.108 filed under Order XXIII Rule 1(3) of CPC was opposed by the defendants vide their say in which they had clearly stated that

the Plaintiff could not be allowed to withdraw the suit and instead, he has to amend the plaint and inturn, the defendants will also have to be given liberty to amend the written statement. After hearing the parties when the said application was rejected, the learned Judge of the trial Court also agreed that in the given circumstances it was better to seek amendment and continue with the suit if there are some formal defects. It was under these circumstances that the application for amendment at Exh.116 was submitted and it was an application of formal in nature setting out altered numbers/description of the suit properties and consequently, the valuation.

8. It is also required to be noted that the reasoning given by the trial Court in the impugned order is as cryptic as it could be. Just because the case was part-heard, the amendment application cannot be held to be not tenable. It was necessary for the trial Court to set out reasons in support of its findings that the application was not tenable. In the facts of this case, it was necessary to allow the amendment application more so, on the background that the earlier application at Exh.108 was rejected.

9. Hence, the petition succeeds and the same is hereby allowed. The impugned order dated 6.12.2004

is hereby set aside and the application at Exh.116 for amendment stands allowed. Consequently, the defendants are allowed to file additional written statement and that should be done within a period of eight weeks from today. The trial of the suit is hereby expedited and it may be heard and decided preferably within a period of six months after the amended written statement is filed.

10. Rule made absolute accordingly with no order as to costs.

[B.H.MARLAPALLE,J.]